**METROPLEX DEVELOPMENT SDN. BHD.**

**v.**

**MOHD MASTANA BIN MAKADDAS & ANOR.**

HIGH COURT MALAYA, SHAH ALAM
DATO' JAMES FOONG J
[CIVIL APPEAL NO. 12-90-1993]
14 APRIL 1995

***TORT**: Fatal accident claim - Accident took place at work site - Deceased collided into by motor lorry at work site - Administrator bringing action against occupier of work site - Whether motor lorry belonged to occupier - Whether there was a presumption that motor lorry on work site belongs to occupier of work site - Appeal against decision of Sessions Court Judge.*

***PRACTICE & PROCEDURE** : Pleadings - Fatal accident claim - Administrators suing occupier of work site - Whether cause of action based on occupiers liability has been pleaded - Whether the elements for such a cause of action have been fulfilled - Whether the claim can succeed.*

The administrators and dependants to the estate of one Mezian bte Nasib (the deceased) brought an action against the defendants as the occupiers of a work site where the deceased was run over by a motor lorry. The administrators claimed that the motor lorry was owned by the defendants and driven by the defendants' servant and/or agent.

The learned Sessions Court Judge held that since the driver of the motor lorry was on the defendants' premises, the burden of proof shifts from the plaintiffs to the defendants to prove that the said vehicle did not belong to the defendants and was not driven by their servant and/or agent when it collided into the deceased. In the circumstances the learned Judge found the motor lorry to belong to the defendants as they had failed to prove otherwise and had hence not rebutted the presumption.

The learned Sessions Court Judge went on to hold that although the deceased was a trespasser at the material time, the defendants were liable to such trespassers as they were aware of earthworks on their premises and the likelihood of trespassers entering onto their land.

The defendants appealed.

**Held:**

**[1]** From the evidence adduced by the plaintiffs/respondents in this case, there is absolutely no proper foundation for the presumption as expounded by the learned Sessions Court Judge to exist. The driver of the motor lorry which collided into the deceased was identified. He made a police report which was included in the agreed bundle of documents. When this fact was known, the solution was for the respondents to prove negligence against this particular driver. The connection of an unnumbered motor lorry on the defendants'/appellants' premises to the presumption that it must have belonged to the appellants, and that whoever drove it was a servant and/or agent of the appellants is extremely remote and uncertain culminating in the conclusion that it is founded without legal basis.

**[2]** Bereft of this presumption, the burden of proof, like in all negligence cases, is always upon the plaintiff making the allegation to establish each and every element of tort, and has not shifted to the appellants. From the appeal records there is no evidence tendered by the respondents which implicate the appellants in the alleged negligence.

**[3]** The respondents only alleged that the deceased was lawfully on the appellants' premises when a motor lorry belonging to the appellants and driven by their servant and/or agent collided into the deceased resulting in her death. There were no material facts pleaded to express that the deceased was a trespasser and that the appellants were aware or ought to have known of the likelihood that trespassers such as the deceased would venture upon their land where activities created by the appellants thereon could endanger her. As the respondents are bound by their own pleadings, their case is only confined to the issues and questions raised therein. Since the issue of occupiers' liability was never pleaded the findings of the learned Sessions Court Judge on this point cannot be sustained.

***Obiter dictum:***

On the question of whether a claim for loss years can be awarded as a pre-trial loss when it is not specifically pleaded; in a case where the plaintiff is claiming under s. 8 of the pre-amendment Civil Law Act due to the loss of a deceased, the award is based on loss of working years. Therefore, it makes no difference whether it be awarded under special or general damages since it has to be awarded when proved.

*[Appeal allowed with costs].*

**Cases referred to:**
*Berry v. British Transport Commission [1961] 3 WLR 450* ***(refd)***
*Mohamed Ali v. PP [1962] MLJ 236* ***(refd)***
*Sim Guan Soon & Anor. v. Khoo Ting Hong & Anor. [1968] 2 MLJ 203* ***(cit)***
*Herrington v. British Railway Board [1972] 1 All ER 747* ***(refd)***
*Hamizan bin Abdul Hamid v. Wong Kok Keong & Anor. [1994] 3 MLJ 630* ***(foll)***
*Robert Addie & Sons (Collieries) Ltd. v. Dumbreck [1929] AC 358* ***(refd)***
*Lembaga Letrik Negara Malaysia v. Ramakrishnan [1982] 2 MLJ 128* ***(refd)***
*Southern Portland Cement Ltd. v. Cooper [1974] 1 MLJ 194* ***(refd)***
*Gantrel v. Egerton [1867] LR 2 CP 371* ***(refd)***
*West Rand Central Gold Mining Co. v. Rex [1905] 2 KB 391* ***(refd)***
*Fox v. H Wood (Harrow) Ltd. [1962] 2 All ER 1100* ***(refd)***
*Janagi v. Ong Boon Kiat [1971] 2 MLJ 196* ***(foll)***
*Yee Wan Leong v. Lai Kok Chai [1990] 2 MLJ 152* ***(refd)***
*Ong Ah Long v. Dr. S Underwood [1983] 2 MLJ 324* ***(dist)***

**Legislation referred to:**
Evidence Act 1950, s. 114
English Occupiers' Liability Act 1984
Civil Law Act 1956, s. 8

**Other sources referred to:**
*Sarkar on Evidence,* 14th Edn., p. 1507
*Practical Approach to Assessment of Liability,* R.K. Nathan

*For the plaintiff - K.G. Ong; M/s. Samad & Yap*
*For the defendant - R.K. Nathan; M/s. R.K. Nathan & Co.*

**JUDGMENT**

**James Foong J:**

This is an appeal against the decision of the learned Sessions Court Judge at Kajang delivered on 29 December 1992.

The appellants in this appeal were the defendants in a civil action brought by the respondents (plaintiffs) who were claiming as administrators and dependants to the estate of one Mezlan bte Nasib (deceased). In the statement of claim filed by the respondents the following were alleged;

> Paragraph 3: On 7 October 1979, at or around 10.15 a.m. Mazlan bte Nasib, deceased was lawfully at the defendants' working site at Project Taman Mukim Ampang II, Selangor when a motor lorry, owned and negligently driven by the defendants' servant and/or agent violently collided into the deceased who died as a result. The said collision was solely caused by the negligence of the defendants' servant and/or agent.
>
> *Particulars of Negligence*
>
> Operating and reversing the said motor lorry without due regard to the presence and safety of the deceased. In the circumstances failing to exercise reasonable diligence, care and skill.

The appellants in their defence though admitting that an accident occured at their work site on that particular day contended that the deceased was a trespasser, and denied that the motor lorry involved was owned by them or driven by their servant and/or agent.

The only material witness called upon to testify for the respondents on the issue of liability was SP1. He stated that at the material time, he and his mother (the deceased) were carrying zinc sheets across the appellants' work site to their nearby home. On the site were vehicles carrying out earth dumping activities. SP1 was walking ahead of the deceased and when he heard a sound of zinc sheets being knocked over, he turned and saw the deceased underneath a motor lorry which bore no registration number.

The learned Sessions Court Judge in her judgment in favour of the respondents identified two issues relating to liability. Firstly, whether the motor lorry which collided into the deceased belonged to the appellants, and was driven by their servant and/or agent at the material time. Secondly, whether the deceased was a trespasser on the appellants' premises at time of accident.

On the first issue, the learned Sessions Court Judge found the motor lorry to belong to the appellants, and that it was driven by the appellants' servant and/or agent at the material time. She based this finding on the grounds that since the driver of the motor lorry was on the appellants' premises, the burden of proof shifts from the respondents to the appellants to prove that the said vehicle did not belong to the appellants and it was not driven by the appellants' servant and/or agent when it collided into the deceased; since the appellants have failed to prove otherwise, the presumption was not rebutted.

Though not expressed in specific term, by implication the learned Sessions Court Judge has assumed the existence of a presumption that, if the driver of a motor lorry is found on a premise, the lorry he was driving must have belonged to the owner of the said premises (the owner), and that he (the driver) was a servant and/or agent of the owner, and unless rebutted by the owner, negligent act caused by such driver is attributed vicariously to that of the

owner. This conclusion is exceedingly farfetched, over extended and devoid of legal foundation. In the warning words of Devlin LJ in *Berry v. British Transport Commission* [1961] 3 WLR 450 at 463:

> if they (presumptions) are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.

Section 114, of the Evidence Act 1950 allows the Court to:

> presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

However, this discretion granted to the Court must be exercised judiciously and not arbitrarily. It must, according to H.T. Ong J (as he then was) in *Mohamed Ali v. PP* [1962] MLJ 236:

> not be drawn automatically, or as it were, by rule of thumb, without first considering whether the circumstances of each particular case there were adequate grounds to justify any presumption being raised.

Therefore, there must be a proper basis for arriving at a presumption, and in order to do so, the connection between the evidence tendered and the presumption relied on must not be too remote and uncertain. It should also not offend any legal principles (see *Sarkar on Evidence*, 14th Edn., at p. 1507). These principles are essential and must be strictly complied with, for it is a general rule that once a presumption is established, the burden lies on the defendant to rebut it. For this, it is wise to heed to the words of Delvin LJ again in *Berry v. British Transport Commission* where he stated that:

> Presumption of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable - in the sense that 'estoppel are ordious' and the 'doctrine should never be applied without a necessity for it'.

From the evidence adduced by the respondents in this case, there is absolutely no proper foundation for the presumption as expounded by the learned Sessions Court Judge to exist. The driver of the motor lorry which collided into the deceased was identified. He made a police report soon after the accident and which report was included in the agreed bundle of documents used during trial. When this fact was known, the solution was for the respondents to prove negligence against this particular driver. If vicarious liability against the appellants was to be established, then there should be evidence tendered to show that that particular driver was at that material time a servant and/or agent of the appellants. The connection of an unnumbered motor lorry on the appellants' premises to the presumption that it must have belonged to the appellants, and that whoever drove it was a servant and/or agent of the respondents is extremely remote and uncertain. The vehicle could have belonged to anyone and driven onto the appellants' premises illegally, just like the deceased coming onto the appellants' work-site. Similarly, the identified driver could have been the owner of the motor lorry or that he was an employee of another person. Thus, the connection between the evidence as tendered and the presumption drawn by the learned Sessions Court Judge is very remote and uncertain culminating to the conclusion that it is founded without legal basis. Bereft of this presumption, the burden of proof, like in all negligent cases is always upon the plaintiff (the respondents) making the allegation to establish each and every element of tort; such burden has not shifted onto the appellants. From the appeal records, this Court is of the opinion that there is no evidence tendered by the respondents which implicate the appellants to the alleged negligence.

On the second issue, the learned Sessions Court Judge firstly made a finding that the deceased was a trespasser on the appellants' premises at the material time. She then proceeded to conclude that since the appellants were aware of earth works on their premises, and the likelihood of trespassers entering onto their land, they were liable to injuries and damage caused to such trespassers, especially when they failed to take reasonable preventive measures, like putting up warning signs. Various passages from the text '*Practical Approach to Assessment of Liability*' by Mr. R.K. Nathan were quoted and in the end she concluded that based on the case of *Sim Guan Soon & Anor. v. Khoo Ting Hong & Anor.* [1968] 2 MLJ 203, which facts are relatively similar to the present case awarded apportionment of liability on a 50-50 basis.

To begin with, the principles in *Sim Guan Soon's* case has since being overruled by the case of *Herrington v. British Railway Board* [1972] 1 ALL ER 747. Secondly, the apportionment of liability cannot be granted when contributory negligence was not pleaded by the appellants - see the case of *Hamizan bin Abdul Hamid v. Wong Kok Keong & Anor.* [1994] 3 MLJ 630.

In any event, this particular issue, involves two matters. Firstly, whether a cause of action based on occupiers' liability has been pleaded, and the other, whether the elements for such a cause of action have been fulfilled in order for such a claim to succeed. From the written judgment by the learned Sessions Court Judge, there seems to be a confusion as to what is the present state of law relating to trespassers injured or suffering damages while on the premises of an occupier. Old principles were quoted while those existing seem to be misunderstood. It is best, for the sake of good order and clarity to elaborate a little on this aspect of the law.

Before 1972, in the case of *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* [1929] AC 358, Lord Hailsham LC laid down the law as follows:

> The trespassers comes onto the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard to the presence of the trespasser.

However all these seem to have changed to a more humane approach after the case of *Herrington v. British Railway Board* was decided. In this case, the House of Lord found the British Railway Board which operated an electrified railway line liable to a 6 year old plaintiff who walked over a broken fence, trespassed onto the railway track and was severely burned by the live line. As aptly expressed by Raja Azlan CJ (Malaya), (as he then was) in *Lembaga Letrik Negara Malaysia v. Ramakrishnan* [1982] 2 MLJ 128 at 131:

> In *Herrington's* case there were five separate speeches and admist such a bewildering array of tests with their imprecisely defined terms, it is difficult to express precisely the *ratio decidendi* of the case.

Nevertheless, the Federal Court in *Lembaga Letrik Negara* accepted the legal principles in *Herrington* and that of a Privy Council's decision of *Southern Portland Cement Ltd. v. Cooper* [1974] 1 MLJ 194, which made similar emphasis, and summarised the legal principles relating to this aspect of the law to be as follows:

> In summary, then, the duty owed to trespassers arise when the occupier knows facts which show a substantial chance that they may come to a place where there is a danger which he has created or knows about, and the duty is discharged by the occupier taking such steps in accordance with the dictates of common humanity and in the light of his own circumstances and financial limitations.

What is essential in this legal principle to our present case is creation of the subjective test based on the occupiers' knowledge, ability and resources. Though this subjective test has been changed to an objective approach by the English Occupiers' Liability Act 1984, of which Malaysia does not have such a piece of legislation, the Malaysian Courts are still bound by the decision of *Lembaga Letrik Negara* under the "unbreakable strangle hold of *stare decisis*." Be it the subjective or objective test, one of the important elements for a plaintiff to prove his case in a situation of this nature is to plead material facts that can imply the occupier having knowledge, ability and resources. Failure to do so could cost the plaintiff not succeeding in his claim. With this in mind, this Court shall next proceed to examine the pleadings.

The primary function of the statement of claim is to plead reasonable cause of action against the defendant. Therefore, it must contain all material facts on which the plaintiff relies his claim. It must also disclose the legal liability of the defendant. By this, it is essential to establish a linkage between material facts pleaded in the statement of claim and the substantive right which the plaintiff claims or seeks to enforce against the defendant. Thus in a case where breach of duty is alleged, the facts upon which the alleged duty is founded must be pleaded, and where there is an allegation of negligence, facts must be set out showing the existence of a duty to take reasonable care owed to the particular person or class of persons and the duty was disregarded - see the judgment of Wallis J in *Gantrel v. Egerton* [1867] 2 CP 371 which was adopted in *West Rand Central Gold Mining Co. v. Rex* [1905] 2 KB 391. Further, in claims where subjective knowledge of the defendant is to be implicated such as they "ought to know" or "ought to have known", material facts relating to such matters must be pleaded - see the case of *Fox v. H Wood (Harrow) Ltd.* [1962] 2 ALL ER 1100.

In the present case before this Court, the respondents only alleged that the deceased was lawfully on the appellants' premises, and a motor lorry belonging to the appellants and driven by their servant and/or agent collided into the deceased resulting in her death. There were no material facts pleaded to express the deceased was a trespasser, and that the appellants occupying the premises were aware or ought to know of the likelihood that trespassers such as the deceased would venture upon their land where activities created by appellants thereon could endanger her. Further, no material facts were disclosed to the effect that in accordance with the dictates of common humanity, and in the light of the appellants' own circumstances and financial limitations relevant steps were taken to prevent such danger from happening. Without such basic material facts being set out in the statement of claim, the appellants were taken by surprise that the claim against them was based on a course of action settled on occupiers' liability. From what was stated in the statement of claim, the appellants were only to answer a charge of negligence caused by a lorry alleged to have belonged to them and driven by one of their servants and/or agents. The appellants were never called upon to answer a claim based on occupiers' liability. Their defence alleging the deceased being a trespasser was purely to traverse the allegation of the respondents that the deceased was lawfully on the appellants' land. This assertion by the appellants of the deceased being a trespasser could not be taken to have opened the flood gate to allow the respondents to include a cause of action under occupiers' liability. As the plaintiffs are bound by their own pleadings their case is only confined to the issues and questions raised therein. Since the

issue of occupiers' liability was never pleaded, the findings of the learned Sessions Court Judge on this point cannot be sustained. It is appropriate here to reiterate the oft quoted passage of Shama J in *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 which found support in the Supreme Court's case of *Yew Wan Leong v. Lai Kok Chai* [1990] 2 MLJ 152 to illustrate this point. It is as follows;

> The Court is not entitled to decide a suit on a matter which no issue has been raised by the parties. It is not the duty of the Court to make a case for one of the parties when the other concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the Court to displace the case made by a party in its pleadings and to give effect to a entirely new case which the party had not made out in its own pleadings. The trial suit should be confined to the pleas on which the parties are at variance.

Based on the reasons above, this Court finds the learned Sessions Court Judge has erred in her application of legal principles, and as such, this appeal should be allowed with cost.

Before concluding, it would be in good order for this Court to decide on an issue raised in this appeal regarding quantum. The question before this Court is whether a claim for loss years can be awarded as a pre-trial loss when it is not specifically pleaded. As the accident in this case occurred in 1979, the law applicable in respect of quantum is the pre-amendment to the Civil Law Act. The amendment under Act A602 only came into effect on 1 October 1984. Under the estate claim by the respondents in pursuant to s. 8 of the pre-amendment to the Civil Law Act, the learned Sessions Court Judge awarded a sum of RM60,000. This she arrived at as follows:

(1) the retirement age of the deceased should be based on 55 years;

(2) the deceased at the time of death was 40 years of age;

(3) for contingency, 5 years purchase was taken out leaving a multiplicand of 10 years;

(4) the deceased loss of income was RM500 per month;

(5) the formula thus used was 500 x 12 x 10 = RM60,000;

(6) this RM60,000 was awarded as pre-trial loss since the trial took 13 years after the accident to complete in 1992.

The appellants now argued that this sum cannot be awarded since it was not specifically pleaded as a pre-trial loss. In support, appellants' Counsel tendered the Federal Court case of *Ong Ah Long v. Dr. S. Underwood* [1983] 2 MLJ 324. The respondents' Counsel on the other hand argued that in a case involving a claim for loss years where the deceased is dead, it makes no difference whether it is awarded under special or general damages; *Underwood's* case above and other authorities gazing on this point relate to claims by plaintiffs who were alive when making their claim for future loss, and not like in this case involving the earnings of a person who is dead. I am in total agreement with the respondents' Counsel on this matter. In a case where the plaintiff is claiming under s. 8 of the pre-amendment Civil Law Act due to the loss of a deceased, the award is based on loss of working years. Therefore, it makes no difference whether it should be awarded under special or general damages since it has to be awarded when proved. The learned Session Court Judge chose to award under this head of special damages for she felt that the award based on 10 years purchase was well before the pre-trial period of 14 years which took this case to finality in the Subordinate Court in 1992. Though it is preferable to make this award under general damages, no injustice was done for the award to be placed under special damages though not specifically pleaded under this category.